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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

—v.—

DONALD H. RUMSFELD, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMICUS CURIAE BRIEF OF SPECIALISTS IN CONSPIRACY AND INTERNATIONAL LAW IN SUPPORT OF PETITIONER [CONSPIRACY–NOT A TRIABLE OFFENSE]

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

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[1] This brief is filed upon consent of all parties and was not authored by any party. Hunton & Williams LLP assisted with the filing of this motion.

Development of International Criminal Law, 93 Cal. L. Rev. 75 (2005) (with Jenny Martinez).

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SUMMARY OF ARGUMENT

The indictment filed against Mr. Hamdan in the military commission at issue in this case charges him with a single count of conspiracy. On the basis, allegedly, of activities as one of Usama bin Laden's civilian motor pool drivers, for a four- or five-year period leading up to the fall of 2001, Mr. Hamdan is charged with conspiracy to commit, *inter alia*, attacks on civilians, murder by an unprivileged belligerent, and terrorism. (Indictment ¶¶ 11-12.) Because Hamdan is charged with no crime other than conspiracy, as defined in the Military Commission Instructions Number 2, 32 CFR §11.6 (2005) ("MCI2"), the commission lacks jurisdiction over his case.

Pursuant to the Uniform Code of Military Justice, military commissions have jurisdiction only over offenses established by statute or by the "law of war." 10 U.S.C. § 821 (1998). The phrase "law of war" (also known as the law of armed conflict)[2] refers to that body of international law that governs armed conflicts. Congress has not by statute established conspiracy as an offense triable by military commission. Nor has it recognized conspiracy as part of the law of war. With lim-

[2] The terms "law of war," "law of armed conflict," and "international humanitarian law," are used interchangeably throughout this brief.

ited exceptions not relevant in this case, conspiracy is not a crime under international law.

Furthermore, this Court has steadfastly refused to recognize, either in dictum or in holding, that conspiratorial agreement constitutes a branch of the law of war subject to prosecution in military tribunals. The Court has had the option on numerous occasions of adopting conspiracy as a constituent element of the law of war. In cases arising from military tribunals—from *Milligan* to *Quirin* to *Eisentrager*—the Court has had before it factual patterns that revealed de facto conspiracies to commit actions hostile to the American government. Yet in no case has the Court said, even in passing, that conspiracy is subject to punishment in a military tribunal.

To conclude in this case that conspiracy is a crime under the law of war would be a radical departure from past practice. To do so, the Court should have very powerful reasons to deviate from its precedents and its tradition. If Hamdan had been an active supporter of al Qaeda and intentionally facilitated its terrorist objectives, he would be subject to a plausible prosecution in federal court—e.g. for a conspiracy to kill when the objects of the attacks are American nationals in violation of 18 U.S.C. § 2332(b), in violation of the seditious conspiracy statute, 18 U.S.C. § 2384, or for providing material support to terrorists, 18 U.S.C. § 2339b there is, therefore, no necessity for the expansion of military tribunal jurisdiction.

Even if this Court finds that conspiracy is an offense triable under the laws of war, the allegations made against Hamdan do not establish that he entered into conspiracy under the minimal standards required in U.S. law to define a punishable conspiracy. The facts as alleged do not constitute a crime within the jurisdiction of a military tribunal under the law of war. This lack of jurisdiction provides an independent basis upon which this court should reverse the judgment below.

ARGUMENT

I. THE JURISDICTION OF THE MILITARY COMMISSIONS AT ISSUE IN THIS CASE EXTENDS ONLY TO OFFENSES THAT ARE SPECIFIED EITHER BY CONGRESS OR BY THE INTERNATIONAL LAW OF WAR

A. Background

This Court granted certiorari on the question, *inter alia*, whether the Uniform Code of Military Justice, Title 10 of the United States Code, authorizes a prosecution of Salim Ahmed Hamdan in a military tribunal under the law of war. 126 S. Ct. 622 (2005). In the court below, petitioner Hamdan argued that the military commission lacked jurisdiction over him because conspiracy does not constitute part of the laws of war. *See* Hamdan Brief of Appellee at 70. The Court of Appeals acknowledged the issue but resolved it in the negative when it wrote, "Although we have considered all of Hamdan's remaining contentions, the only one requiring further discussion is [whether] . . . Army Regulation 190-8 provides a basis for relief." 415 F.3d at 43. We disagree. The issue does require further discussion. Even if the Court of Appeals ruled correctly on every other issue, they were in error on the jurisdictional reach of military commissions. The Uniform Code of Military Justice establishes the jurisdiction of military commissions over "offenders or offenses that by statute or by the law of war may be tried by military commissions." 10 U.S.C. § 821. Congress has statutorily established only that military commissions may try individuals for aiding the enemy (§ 904) and spying (§ 906). Pursuant to the plain terms of § 821, any *other* offense triable by military commission must derive from the law of war.

B. The Law of War is a Body of International Law

The Supreme Court has made clear that the phrase "law of war," as used in § 821, refers to international law. *Ex parte*

Vallandigham, 68 U.S. (1 Wall.) 243, 249 (1864) (quoting the Lieber code of 1863). Construing the predecessor of § 821 in *Ex Parte Quirin v Cox*, the Court said that

> Congress . . . has thus exercised its authority to define . . . the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, . . . are cognizable by such tribunals.

Ex parte Quirin v Cox, 317 U.S. 1, 28 (1942). This passage clarifies the Court's understanding of the law of war as a subset of international law. Nowhere in *Quirin* did the Court suggest, however, that the Articles of War provided for prosecution of offenses not found either in statutes enacted by Congress or in that part of customary international law governing armed conflict.

Other cases decided by this Court further underscore the international character of the law of war. In the trial of General Yamashita for the failure to prevent his troops from engaging in atrocities, General MacArthur invoked a military tribunal after the cessation of hostilities. The defense argued that this was impermissible. Chief Justice Stone, writing for the majority, responded in part, "No writer on international law appears to have regarded the power of military tribunals, otherwise competent to try violations of the law of war, as terminating before the formal state of war has ended." *In re Yamashita*, 327 U.S. 1, 13 (1946). The decisive authorities, in this Court's view, were the writers of international law.

In a later case arising out of a military tribunal, *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Court had to consider whether German civilians working in China who provided military information to the Japanese in the summer of 1945 (after the fall of Germany but before the surrender of Japan) violated the customary law of war. The authorities cited by the Court were all writers of international law, including Lauterpacht, Vattel, and Moore. *Id* at 787-88; *see also Madsen v. Kinsella*, 343 U.S. 341 (1952).

It is a critical, but easily overlooked point, that the law of nations—or international law—is a uniform body of law. It cannot be based solely on the practice of a single nation. The law of war derives from two sources: treaties and customary international law. Customary international law consists of rules derived from the convergent practice of nations developed gradually over time that follows from a sense of legal obligation. *The Paquete Habana*, 175 U.S. 677, 711 (1900).

In order for the military commission to have jurisdiction over Hamdan's case, therefore, the government must establish that conspiracy to commit attacks on civilians, conspiracy to commit murder by an unprivileged belligerent, and conspiracy to commit terrorism are all crimes under the international law of war.

II. CONSPIRATORIAL AGREEMENTS ARE NOT PUNISHABLE UNDER THE LAW OF WAR.

A. Conspiracy under MCI2 Contains Two Forms of Liability, Neither of Which Qualifies under the Law of War.

MCI2 § 6(C)6, imposes liability when:

> (1) The accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission *or otherwise joined an enterprise of persons who shared a common criminal purpose* that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission. (Emphasis supplied).

This definition differs in several respects from the concept of conspiracy as developed under federal law. The most significant point of departure is the addition of the words "joined an enterprise of persons who shared a common criminal purpose that involved, at least in part, the commission or

intended commission of one or more substantive offenses triable by military commission." As discussed below in Part IV, the international doctrine of "joint criminal enterprise," from which this language is probably derived, has nothing to do with the crime of conspiratorial agreement. "Criminal enterprise" is a concept foreign to U.S. law. This piece of the definition of conspiracy as used in MCI2, therefore, has no analog in either international or federal law. It represents a form of liability below the normal threshold of conspiracy and therefore we refer to this form of liability for "joining an enterprise of persons" as sub-conspiratorial liability.

Putting to one side this sub-standard form of conspiratorial liability, we use the term "conspiracy" in this brief as the term is understood in 18 U.S.C. § 371, and as we believe it is intended in the first clause of MCI2 § 6(C)6, namely as "enter[ing] into an agreement with one or more persons to commit one or more substantive offenses." As we argue in the following sections, the strict form of conspiracy alleged in the first clause of MCI2 § 6(C)6 (entering into a conspiratorial agreement) does not constitute a crime under the law of war. Even if this Court should decide, however, that the traditional form of conspiracy is defined in 18 U.S.C. § 371, we argue in Part VI below that the sub-conspiratorial liability charged against Hamdan ("joining an enterprise of persons") is not within the jurisdiction of military commissions as recognized by 10 U.S.C. § 821.

B. The Common Law Practice of Punishing Conspiratorial Agreements Differs from the Rest of the World.

To understand whether conspiracy in the strict sense of 18 U.S.C. § 371 is part of the international law of war, we must distinguish among three branches of the law associated with conspiracy: First, the conspiratorial agreement as defined in 18 U.S.C. § 371 and the first clause of MCI2, § 6(C)6(1); Second, the use of conspiracy in the Nuremberg trials to refer

to the collective planning, preparing, initiating, and waging of aggressive war; and Third, conspiracy as a criterion of complicity for the commission of substantive crimes. The second and third doctrines are accepted in international law, although they sometimes appear under different labels and guises. The Nuremberg version of conspiracy has merged with the crime of planning and preparing aggressive war, *See* German Criminal Code § 80. The complicity doctrine of conspiracy is expressed in "joint criminal enterprise" as developed by the International Criminal Tribunal for the former Yugoslavia ("ICTY"). The recognition of the Nuremberg and complicity branches, however, does not imply the international recognition of the conspiracy in the sense of 18 U.S.C. § 371, which consists exclusively in the agreement to commit an offense in the future.

The crime of conspiratorial agreement, as it exists under 18 U.S.C. § 371, does not constitute part of the international law of war. Neither treaties nor international customary law support the conspiracy charge in the Hamdan indictment. The military commissions, therefore, are simply without jurisdiction, in the absence of more specific congressional legislation, to entertain this conspiracy charge.

A few words of history will help us understand why and how the common law took a path different from Continental and Islamic legal systems. Beginning in the seventeenth century, the common law courts took the private law concept of "acting in concert" or "conspiracy" and began to punish specific agreements to commit unlawful acts. The original context was conspiracy to engage in crimes against the administration of justice, as by procuring "false and malicious indictments." Ordinance of Conspirators, 1305, 33 Edw. 1. *See generally* "Developments in the Law, Criminal Conspiracy," 72 *Harv. L. Rev.* 920, 922-23 (1959). An unexecuted conspiratorial agreement became a general common law offense in the Star Chamber of the early seventeenth century. *Poulterer's Case*, 77 Eng. Rep. 813 (Star Chamber 1611). The essence of the crime today, as defined today in 18

U.S.C. § 371, is an agreement to commit an unlawful act. *Compare* Model Penal Code ("MPC") § 5.03 (agreement to commit an unlawful act).

The idea that agreements *per se* are punishable has never found acceptance in Continental European law. Typical of the European approach is § 115 of the 1930 Italian Penal Code, which provides that, "[s]o far as the law does not provide to the contrary, if two or more persons agree to commit a criminal act and the act is not committed, no one may be punished for the simple fact of the agreement." There is no code in Continental Europe that contains a provision comparable to 18 U.S.C. § 371 or MPC § 5.03 . European scholars are unanimous on this point. Antonio Cassese, *International Criminal Law* 191 (2003); Gerhard Werle, *Völkerstrafrecht* 165 (2003)(no basis in international law for a charge of conspiracy to commit a war crime or a crime against humanity), recently translated as Gerhard Werle, *International Criminal Law* (2005).

This is not to say we should defer to European standards of criminal law, but the rejection of the first branch of conspiracy (call it 18 U.S.C. § 371 conspiracy or conspiratorial agreement) by the rest of the world does strongly suggest that conspiracy cannot be part of the international law of war. It does not meet the essential test of commonality and convergence defining the law of war.

There could, of course, be a special rule of international law holding that conspiracy is a crime as a matter of *international* law, but, as the following sections demonstrate, there is not even a hint of this rule in the traditional law of nations. Conspiracy does not form part of the laws of war and, therefore, the military commissions do not have jurisdiction over the sole charge alleged against Hamdan.

C. None of the Treaties Governing the Laws of War, International Criminal Law, or Terrorism includes the Crime of Conspiracy

The treaties governing the law of war are significant in determining conspiracy's status in the law of war either because they apply directly to Mr. Hamdan's case or because many of the principles articulated by them constitute customary international law. None of the major treaties on the laws of war, including any of the Geneva or Hague Conventions, makes any reference to conspiracy.

The failure of the 1949 Geneva Conventions to refer to conspiracy is particularly significant because these treaties contemplate that individual nation-states will enforce the most important provisions of the treaties (the so-called "grave breaches") through domestic criminal proceedings. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 129, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Third Geneva Convention") (stating that each "High Contracting Party" must "undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention" and must "bring such persons, regardless of their nationality, before its own courts"). The grave breaches under the Third Geneva Convention, for example, are willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or willfully depriving a prisoner of war of the rights of fair and regular trial. *Id.* at art. 130.

There is no mention of conspiring to commit such crimes in the treaties, even though the Geneva Conventions are careful to extend liability beyond those who actually cause harm those who "order" the crimes to be committed. *Id.* at art. 129. The U.S. War Crimes Act of 1996, 18 U.S.C. § 2441 (2000), which fulfills the U.S. obligation under the Geneva Con-

ventions to incorporate the grave breach provisions into our criminal code, also makes no mention of conspiracy. This failure to mention conspiracy is especially significant in light of the inclusion of specific conspiracy provisions in other crimes in Title 18, including torture (§ 2340A(*c*)), terrorism (§ 2332(b)), and sedition (§ 2384).

The statutes and treaties establishing the major tribunals adjudicating international criminal law, namely the ICTY, the International Criminal Tribunal for Rwanda ("ICTR"), and the International Criminal Court ("ICC"), also provide evidence of the status of conspiracy as a matter of the customary law of war, since the jurisdiction of these courts includes violations of the law of war. *See* Statute of the International Criminal Tribunal for the former Yugoslavia, May 25, 1993, art. 1, 32 I.L.M. 1192 ("The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991"); Statute of the International Criminal Tribunal for Rwanda, Nov. 8, 1994, art. 1, 33 I.L.M. 1598 ("The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994"); Rome Statute of the International Criminal Court, July 17, 1998, art. 8, 37 I.L.M. 999 ("ICC Statute") ("The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.").

When the United Nations Security Council, with the support of the United States, established the ICTY and ICTR, it declined to include conspiracy within the jurisdiction of these courts, with the limited exception of conspiracy to commit genocide. Virginia Morris & Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* 96 (1995). Similarly, the Rome Statute, estab-

lishing the ICC, does not criminalize conspiracy. Inclusion of the conspiracy charge in the Genocide Convention made sense in 1948 because the international community was then so shocked by the Holocaust in Germany that it seemed plausible to punish every conceivable preliminary and inchoate act of genocide it could think of, including conspiracy to commit assault with genocidal motives. *See* Genocide Convention §§ Article 2(b), Article 3(b). But the Rome Statute of 1998, reflecting a calmer moment of history, has adopted every word of the Genocide Convention except the provision permitting the charge of conspiracy. ICC Statute 6(b). Antonio Cassese, *Genocide, in The Rome Statute of the International Criminal Court: A Commentary* 335, 347 (Cassese, Gaeta & Jones eds., 2002). The narrow references in the Genocide Convention and ICTY and ICTR statutes to conspiracy to commit genocide reflect the afterglow of a dying concept. They do not stand for the proposition that conspiracy to commit any other crimes forms part of the law of war.

By like token, the major treaties on terrorism do not mention conspiracy at all. *See* International Convention for the Suppression of the Financing of Terrorism, Jan. 10, 2000, art. 2, S. Treaty Doc. No. 106-49, 39 I.L.M. 270 (describing liability under the Convention); International Convention for the Suppression of Terrorist Bombings, Jan. 12, 1998, S. Treaty Doc. No. 106-6, 37 I.L.M. 249 (same); International Convention against the Taking of Hostages, Dec. 17, 1979, art. 2, T.I.A.S. No. 11081, 1035 U.N.T.S. 167 (same); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, art. 2, 28 U.S.T. 1975, 1035 U.N.T.S. 167 (same).

Other than the narrow and time-specific Genocide Convention, discussed above, the only references to conspiracy in the treaties of the last sixty years are found in provisions of the following sort found in the Convention on Drugs and Psychotropic Substances (1988), Art. 3:

> 1. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, . . . c) Subject to its constitutional principles and the basic concepts of its legal system: iv) Participation in, association or *conspiracy to commit*, attempts to commit and aiding, abetting, facilitating and counseling the commission of any of the offences established in accordance with this article (emphasis added).

Similar provisos are found in the Convention on Psychotropic Substances, Article 22(2)(a)(ii) (1971) and the United Nations Convention Against Transnational Organized Crime, Art. 6(1)(b)(ii)(2000). These provisions recognize the diversity of legal cultures. Some legal systems recognize conspiracy and others do not. We do. Others do not. When only some countries accept a particular doctrine, it cannot become part of customary international law applicable to all nations as part of the law of war.

III. THE INTERNATIONAL MILITARY TRIBUNALS AT NUREMBERG AND TOKYO REJECTED THE APPLICATION OF CONSPIRACY TO WAR CRIMES.

The Nuremberg trials are often to taken to stand for the possibility of convicting conspiracies under international law. Upon closer examination, neither the Charter of the International Military Tribunals ("IMT"), the indictment of the twenty-two defendants, nor the Opinion and Judgment of the IMT supports the conclusion that conspiracy is a crime under the law of war. Article 6 of the Charter of the IMT identifies three crimes subject to prosecution: crimes against peace, war crimes, and crimes against humanity. The word "conspiracy" is mentioned twice, first as an alternative way of committing a crime against peace (Article 6(a)) and as a tack-on after Article 6(c): "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing

crimes are responsible for all acts performed by any persons in execution of such plan." Neither of these references justifies a charge of conspiratorial agreement as an independent crime.

The first reference in 6(a) to a "common plan or conspiracy" does not define a separate crime but rather an alternative way of committing the crime against peace by "planning, preparing, initiating or waging" aggressive war. The conspiracy alternative is redundant and irrelevant because the very acts of planning, preparing, initiating or waging war require group participation. As lawyers often duplicate verbs to cover all possible loopholes, the drafters of the Charter added the superfluous idea of "common plan or conspiracy" to the description of actions that by their nature require the participation of others. No one plans, prepares, initiates or wages war by himself. These are by their nature collective actions. They are inherent conspiracies. *See* George P. Fletcher, *The Storrs Lectures: Romantics and Liberals at War: The Problem of Collective Guilt*, 111 Yale Law Journal 1499, 1513-26 (2002).

Yet the chief American prosecutor in Nuremberg, Justice Robert Jackson, had a clear sense about the rhetorical significance of conspiracy and therefore pressed for four counts in the indictment, one for each of the crimes listed in the Charter plus Count One, which charged the 22 defendants with the distinct crime of "common plan or conspiracy" to commit the other three offenses. The basis for this additional count was not the duplicative reference to conspiracy in Article 6(a) but rather the sentence tacked on after Article 6(c), namely that all conspirators would be "responsible for all the acts performed by any persons in execution of the plan." This is the *Pinkerton* principle that we take up below, namely that conspirators are liable for the substantive offenses committed by coconspirators in furtherance of the common plan.

The reasoning of the Nuremberg indictment is what we might call the reverse-*Pinkerton* doctrine. If the Charter rec-

ognized conspiratorial liability for the substantive offenses committed by others, then it was supposedly true that conspiratorial agreement, as such, constituted an independent crime. In legal terms, this is a enormous non sequitur. It would be like arguing that if aiding and abetting makes one liable for a substantive offenses committed by another, 18 U.S.C. § 2, then aiding and abetting is a separate crime. Of course, it is not. And yet the prosecution in Nuremberg attempted to make an equally fallacious inference.

The prosecution did not succeed on either front, either in securing application of the *Pinkerton* principle or of the reverse-inference of conspiratorial agreement as a separate crime. As to the yet-to-be-denominated *Pinkerton* rule, the Tribunal failed to apply the rule in the case of Rudolph Hess, who was convicted on counts one (conspiracy) and two (crimes against peace) but acquitted on counts three (war crimes) and four (crimes against humanity). If the *Pinkerton* rule had been applied, he would have been automatically guilty on the latter two counts.

For purpose of this brief, however, the important charge is the one laid against Hamdan, namely conspiratorial agreement. If the prosecution had succeeded in its attempt to infer conspiracy from the *Pinkerton* rule expressed in the Charter, the Nuremberg judgment might be a precedent favoring the recognition of conspiracy as a crime in the law of war. But the prosecution failed, and it failed dramatically.

The showdown occurred not in a public argument but in the June 1946 deliberations of the eight judges representing the primary four victorious powers, France, Great Britain, the Soviet Union, and the United States. The French judge, a well-known professor of criminal law, Henri Donnedieu de Vabres, made the argument virtually every Continental jurist wanted to make against the American and British effort to include conspiracy within the realm of permissible charges against the Nazi leaders, namely that conspiracy is foreign to every legal system outside the English-speaking world.

Donnedieu de Vabres summarized his case in the ingenious maxim "the crime absorbs the conspiracy." Bradley F. Smith, *Reaching Judgment in Nuremberg*, 123 (1963) ("Smith, *Nuremberg*"). By this remark, he meant that the language of the Charter supports, at most, a theory of complicity. Since complicity (or aiding and abetting) does not represent a crime independent of the crime aided and abetted, "the crime absorbs the conspiracy."

As evidenced by the pattern of convictions, the IMT obviously agreed to accept the basic logical dependence of conspiracy on the commission of substantive offenses. The IMT convicted four defendants of crimes against the peace (count two) but because they were lesser figures, acquitted them of the conspiracy charges (count one). The four were Frick, Funk, Seyss-Inquart, and Doenitz. For a record of all the charges and convictions in the first major trial, see Smith, *Nuremberg* at 307.

The aftermath of Donnedieu de Vabres' challenge to the Tribunal is of utmost significance for the instant case. The judge most sympathetic to the critique by Donnedieu de Vabres was Francis Biddle, the former American Attorney General who three years previously had been responsible for the prosecution of the eight German saboteurs in the *Quirin* case. *See* Smith, *Nuremberg* at 126. One of Biddle's judicial aides, the scholarly Herbert Wechsler, professor at Columbia and later architect of the Model Penal Code, expressed sympathy for the French position. Yet the other judges resisted the clear Cartesian analysis offered by Donnedieu de Vabres. This led to a major crises in the IMT about whether to retain any reference to conspiracy in the final judgment. *See generally* Smith, *Nuremberg*, Chapter Five.

Not surprisingly, the judges reached a compromise. On both legal and evidentiary grounds, they rejected the possibility of a conspiracy to commit war crimes or crimes against humanity. Smith, *Nuremberg* at 129-30. The only count that could sustain a conspiracy charge was the crime against

peace, which consisted in "planning, preparation, initiation or waging of a war of aggression." There was little harm in recognizing the conspiracy count in this context because these modes of committing a crime against peace were in their nature collective actions. The conspiracy duplicated the collective actions of "planning, preparation, initiation and waging." *See United States v. Goering*, 22 Trial of the Major War Criminals before the International Military Tribunal 411 (start of judgment), at 469 (September 30, 1946).

The primary message of the judgment in *Goering* is that conspiracy does not stand alone as an independent crime. It must be joined with other crimes in order to secure a conviction. This message is borne out in the subsequent cases prosecuted by Telford Taylor, who tried to secure convictions on the charge of conspiracy in seven cases against over 100 defendants, but he failed in every case. Trial of Josef Altstötter & Others, in VI Law Reports of Trials of War Criminals 1, 109-10 (United Nations War Crimes Comn. ed., 1948) ("The Justice Trial"). Significantly, Telford Taylor's failed argument for the existence of the crime of conspiracy to commit war crimes did not rely on the crime's inclusion in the law of armed conflict. Instead, he emphasized conspiracy's existence in English and American criminal law. *Id.* at 106-09 (summarizing the "principal prosecution arguments" on the application of conspiracy). The judges rejected General Taylor's argument, finding that they did not have jurisdiction over conspiracy to commit war crimes or crimes against humanity. *Id.* at 109.

The point could not be clearer. Nuremberg stands for the principle that conspiracy is a redundant and irrelevant charge. It could stand not alone at Nuremberg, and even if supplemented by the charge of "joining a joint criminal enterprise," it cannot stand alone in the Department of Defense ("DOD") prosecution of Salim Ahmed Hamdan.

The prosecutors at the International Military Tribunal for the Far East (IMTFE), which tried members of the Japanese

Government after World War II, also initially attempted to rely on a broad notion of conspiracy, accusing the defendants of conspiracy to commit crimes against peace, crimes against humanity, and war crimes. But, like the judges at Nuremberg, the judges at the IMTFE sharply limited the conspiracy count, holding that "the charter does not confer any jurisdiction in respect of a conspiracy to commit any crime other than a crime against peace." International Military Tribunal, Judgment, *in International Military Tribunal for the Far East* 48,413, 48,449-51 (1948).

Moreover, the General Assembly resolution known as the Nuremberg Principles, passed by the United Nations General Assembly in 1950 as a statement of customary international law, also limits the application of conspiracy to crimes against peace. Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, U.N. GAOR, 5th Sess., Supp. No. 12, Principle VI, U.N. Doc. A/1316 (1950) (the "Nuremberg Principles"). The Nuremberg Principles do not recognize conspiracy to commit war crimes or crimes against humanity as a crime under international law. They do provide that "[c]omplicity in the commission of a crime against peace, a war crime, or a crime against humanity . . . is a crime under international law," but they make no reference to a similar role for conspiracy. Nuremberg Principles, Principle VII. As we noted before, the use of conspiracy in charges to wage aggressive war duplicates the collective action implied in "preparing, planning, initiating, or waging" the aggressive war. These are crimes that no individual can commit without the assistance of a group. In short, the jurisprudence of the post-World War II tribunals does not support the conspiracy charge in this case and instead reveals a consistent pattern of limiting conspiracy to the those cases in which the use of the concept is redundant to the primary offense.

IV. THE INTERNATIONAL CRIMINAL DOCTRINE OF "JOINT CRIMINAL ENTERPRISE" IS NOT EQUIVALENT TO THE CRIME OF CONSPIRACY.

Despite the strict limitations imposed upon the scope and application of conspiracy at the IMT and IMTFE and the total absence of conspiracy (with the limited exception of conspiracy to commit genocide) at the ICTY and ICTR, various liability doctrines have been developed to cope with the problem of crimes committed by groups. A theory of liability, variously called joint criminal enterprise, common purpose, or common plan liability does find support in World War II-era jurisprudence and in cases from the ICTY. This doctrine, however, is legally distinct from conspiracy.

The theory of liability known as joint criminal enterprise, common purpose, or common plan liability does not appear explicitly in the statute of the ICTY, but it has been found applicable by the ICTY on the basis of customary international law. The ICTY first applied the doctrine in the *Tadic* case. *Prosecutor v. Tadic*, Judgment, Case No. IT-94-1-A (Int'l Crim. Trib. for the Former Yugoslavia Appeals Chamber July 15, 1999).

Pursuant to joint criminal enterprise liability, an individual may be held responsible for all crimes committed pursuant to the existence of a common plan or design to commit a within the court's jurisdiction if the defendant participates with others in the common design and intends to effect the crime which is the object of the joint criminal enterprise. *Prosecutor v. Vasiljevic*, Judgment, Case No. IT-98-32-A, ¶¶ 94-101 (Int'l Crim. Trib. for the Former Yugoslavia Appeals Chamber Feb. 25, 2004) (summarizing joint criminal enterprise jurisprudence). To be found guilty of the crime of murder on a joint criminal enterprise theory, for example, the prosecution must prove that the common plan was to kill the victim, that the defendant voluntarily participated in at least one aspect of this common design, and that the defendant intended to assist in the commission of murder, even if

he did not himself perpetrate the killing. *Tadic*, ¶ 19;. *see also* Allison Marston Danner and Jenny Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 Calif. L. Rev. 75 (2005).

Joint criminal enterprise must be sharply distinguished from the *Pinkerton* doctrine, which takes conspiracy as a litmus paper standard for complicity. The foundations for the *Pinkerton* rule were laid in the Charter of the International Military Tribunal in Nuremberg, which provided additional liability "for all the acts performed by any persons in execution of the [conspiratorial] plan." As already noted, the Nuremberg Tribunal did not rigorously apply this rule, notably acquitting Hess of war crimes and crimes against humanity after convicting him both of counts one and two, namely conspiracy to wage aggressive war and waging aggressive war. Though the Supreme Court approved the principle in 1946, three years later Justice Jackson, having returned from his service in Nuremberg, objected strongly to the new theory of complicity:

A recent tendency has appeared in this Court to expand this elastic offense and to facilitate its proof. In *Pinkerton v. United States*, 328 U.S. 640 (1946), it sustained a conviction of a substantive crime where there was no proof of participation in or knowledge of it, upon the novel and dubious theory that conspiracy is equivalent in law to aiding and abetting. *Krulewitch v. United States*, 336 U.S. 440, 451 (1949).

The Model Penal Code has also distanced itself from this doctrine of conspiracy as a criterion of complicity. MPC § 3.06 defines complicity, and § 5.03 defines conspiracy. There is no linkage between the two.

Joint criminal enterprise differs sharply from the *Pinkerton* doctrine first, because it does not stand for free-standing criminal offense like conspiracy, and second, it does not automatically impose liability for complicity but rather requires

a case by cases analysis of the participation in the common criminal purposes.

The ICTY has emphasized that joint criminal enterprise liability is distinguishable from conspiracy, even when the similarities between them have been argued by defense counsel. *Prosecutor v. Milutinovic*, Decision on Dragoljub Ojdani's Motion Challenging Jurisdiction—Joint Criminal Enterprise, Case No. IT-99-37-AR72 ¶ 26 (Int'l Crim. Trib. for the Former Yugoslavia Appeals Chamber May 21, 2003) (stating that "[c]riminal liability pursuant to a joint criminal enterprise is not a liability for . . . conspiring to commit crimes"). The ICTY, therefore, is very clear that joint criminal enterprise does not constitute a separate crime. It is not an inchoate offense of agreement or "joining an enterprise of persons" with a criminal objective, as is now charged against Hamdan.

The DOD charges Hamdan with conspiratorial agreement (broadly defined) as a free-standing crime. It does not assert either a joint criminal enterprise in the sense developed by the ICTY or liability under the *Pinkerton* doctrine recognized by this Court, though criticized by Justice Jackson. The question in this case is not whether the prosecutor *could* charge Hamdan with some other offense that would be cognizable under the law of war, but rather whether the prosecutor has already in *this* indictment charged an offense triable by military commission. As a result, the joint criminal enterprise doctrine, which has not been charged in this case, is legally irrelevant.

V. THIS COURT HAS NEVER RECOGNIZED CONSPIRACY AS PART OF THE LAW OF WAR EVEN THOUGH IT HAS HAD AMPLE OPPORTUNITIES TO DO SO.

As the above sections establish, international law has not accepted conspiratorial agreement as a crime in the law of war. Even more telling than the silence of international

treaties on the issue of conspiracy is the jurisprudence of this Court, which has repeatedly rejected the possibility of affirming conspiracy as a punishable offense before military tribunals. The long series of confirming cases begins with the benchmark decision in *Ex Parte Milligan*, 71 U.S. 2 (1866). The government charged Milligan with numerous counts of sedition including a vague reference to a "conspiracy against the United States." There is no mention of the object of this alleged conspiracy, but significantly, this charge is clearly distinguished from count five of the indictment alleging "violation of the law of war," indicating that conspiracy was distinct and different from violations of the law of war. The distinction between conspiracy theories and the law of war is confirmed in the leading work of the nineteenth century, William Winthrop, *Military Law and Precedent*, 839 (2nd ed. 1920)(grouping conspiracy with substantive crimes such as murder and theft, all distinguishable from offenses against the law of war).

For our purposes, the most significant case is *Ex Parte Quirin v. Cox*, 317 U.S 1 (1942), the influential judgment of this Court upholding the use of military commissions on a charge of violating the laws of war. The eight German infiltrators who landed by submarine off the coasts of Long Island and Florida were charged with four counts:

> 1. Violation of the law of war.
>
> 2. Violation of Article 81 of the Articles of War, defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy (18 U.S.C. § 904 (2005))
>
> 3. Violation of Article 82, defining the offense of spying (18 U.S.C. § 906 (2005))..
>
> 4. Conspiracy to commit the offenses alleged in charges 1, 2 and 3.

As in *Milligan* the charges alleging a violation of the law of war and conspiracy were listed in separate counts. This

charging scheme strongly indicates that Attorney General Biddle, later to become so skeptical about the conspiracy charge in Nuremberg, regarded the two worlds as divided by a conceptual barrier—the law of war on one side and conspiracy on the other. Ironically, the conspiracy charge was the most coherent and most easily proven charge against the eight German defendants. Apart from their shared plan of action, they had not committed an offense against the laws of the United States—except illegal entry into the country. They had not done enough on American soil to be liable under either count two (§ 904 (assisting the enemy)) or count three (§ 906 (spying)). It seems that President Roosevelt had thought the infiltrators would be liable under these two provisions of Title 10, counts two and three of the indictment. In drafting the executive order establishing the commission by Proclamation 2561, July 2, 1942, 7 FR 5101, the president apparently thought it was sufficient that those who landed illegally on American shores were "preparing" to commit sabotage or espionage. The problem was that §§ 904 and 906 of Title 10 do not punish mere "preparation." They require actual "aid or attempt to aid" the enemy (§ 904) or, in the case of spying, "lurking" around a sensitive military installation (§ 906).

The most coherent charge against the eight defendants, therefore, was the fourth count, conspiracy to violate counts 1, 2, and 3. Surprisingly, however, Chief Justice Stone's opinion for the Court does not even mention the possibility of convicting the eight for conspiracy. Instead (five months after six of the eight convicted defendants had been executed!) the Chief Justice developed the novel theory that they were punishable as "unlawful combatants," a crime under count one of the indictment alleging, in the abstract, a "violation of the law of war."

The question, therefore, is why the Court chose to focus on this unprecedented theory of a violation of the law of war. The more plausible charge was conspiracy but the Court refused to touch it. Toward the end of his opinion, Chief Jus-

tice Stone summed up the status of the four charges levied against the four defendants then tried and convicted by the military tribunal:

> Since the first specification of Charge I sets forth a violation of the law of . . . war, we have no occasion to pass on the adequacy of the second . . . specification of Charge I, or to construe the 81st (now 18 U.S.C.§ 904) and . . . 82nd Articles of War (now 18 U.S.C. § 906) for the purpose of ascertaining . . . whether the specifications under Charges II and III allege . . . violations of those Articles or whether if so construed they are . . . constitutional'. *Ex Parte Quirin v. Cox*, 317 U.S. at 22.

The striking omission from this paragraph is the failure even to mention Charge IV, namely "conspiracy to commit the offenses alleged in charges 1, 2 and 3." This omission underscores the fact that the conspiracy charge was not credible under the law of war.

In all the cases since *Quirin* that have arisen out of military commissions, this Court has adhered to the choice implicit in *Quirin*, namely that conspiracy is not a basis for prosecuting violations of the law of war. Instead of relying on a conspiracy between General Yamashita and his subordinates. In *In re Yamashita*, 327 U.S. 1 (1946), the Court developed the novel doctrine of command responsibility based on the negligent failure of the general to supervise his troops in the field. This doctrine has become part of the law of war, now affirmed as basis of liability in the ICC Statute Art. 28.

More recently, in a case testing the reach of the "law of nations" in different legal context, this Court similarly ignored an obvious conspiracy in contemplating the proper legal characterization of the facts. In *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004), agents of the United States Drug Enforcement Agency conspired with a group of Mexican nationals to abduct Alvarez-Marchain from his home in Mexico and bring him to the United States to stand trial.

Alvarez-Machain subsequently sued Sosa as well as other co-conspirator under the Alien Tort Statute for abduction and false imprisonment "in violation of the law of nations." 28 U.S.C. § 1350. Though this Court unanimously upheld the Alien Tort Statute in principle, it rejected Alvarez-Machain's claim as too speculative for recovery under the statute. Justice Souter, writing for the Court, characterized the incident as "arbitrary detention" and found that temporary arbitrary detention was insufficient to constitute a violation of the law of nations. We have no disagreement with this holding. Interesting for our purposes, however, is that the detention and kidnapping were in fact executed by a conspiracy constructed for that purpose. The Court did not acknowledge the conspiracy as relevant to the claim under international law. This is but another in a long line of cases in which the factor of conspiracy falls below the threshold of the Court's legal sensibility.

Now the DOD asks the Court to change a pattern of decision-making that has been in force since the Civil War. The DOD seeks to have "conspiracy" declared to be a violation not only of the law of nations but of the international law of war. It goes further, as we consider in the next part of the argument, and seeks to expand the doctrine of conspiracy to include elements of the foreign doctrine of joint criminal enterprise. There are no sound reasons for this radical departure both from the customs of international law and the established law of this Court.

VI. EVEN IF THIS COURT SHOULD DEPART FROM PRECEDENT AND ESTABLISH CONSPIRACY AS A CRIME IN THE LAW OF WAR, IT SHOULD LIMIT THE JURISDICTION OF MILITARY TRIBUNALS TO CONSPIRACY AS UNDERSTOOD IN THE PRECEDENTS OF THIS COURT.

The law of conspiracy has been notoriously vague about the acts required for entering into a conspiracy or for joining an existing band bent on criminal purposes. The minimal

component required by all legislative formulations is an agreement to engage in the criminal actions. *See* MPC §§ 5.03 (1) (agreement that one or more will commit the crime); 18 U.S.C. 371 (agreement to commit); MCI2 §§ 6(C)6 (entered into an agreement to commit crimes triable by military commission). The indictment against Hamdan does not allege that he entered into an agreement that he or others would engage in crimes subject to punishment in a military commission. Rather it alleges the alternative prong of MCI2 § 6(C)6(1) that he "joined an enterprise of persons who shared a common criminal purpose." The DOD seeks to water down the concept of conspiracy to include what we should call sub-conspiratorial forms of liability. This Court should not permit this deviation from its own definitions of the crime of conspiracy.

There is no law governing the charge of "joining an enterprise of persons who share a common purpose." How do you do it? Is it enough to hate the United States and to give a speech on behalf of al Qaeda? The indictment alleges Hamdan identified himself with al Qaeda by giving speeches, but there is no decision of this Court that would permit us to treat the emotional support of a criminal organization as either agreement to commit a criminal act or some other form of sub-conspiratorial liability. Even if the military commissions have jurisdiction over the charge of conspiracy, they do not have jurisdiction over forms of alleged criminal action that have never been recognized by this Court.

The facts alleged in the indictment do not state a crime within the jurisdiction of a military commission under the law of war. The history of criminal organizations is replete with minor figures who know exactly what the criminal organization intends to do but no one ever considers prosecuting them as members of a criminal conspiracy. Why not?

The answer lies is Justice Learned Hand's opinion in the in *United States v. Falcone*, 109 F.2d 579. In this leading case in the field, the Second Circuit held that as a matter of law

the supplier of sugar to distillers was not guilty, despite his knowledge of the illegal purpose, of joining the illegal organization of distillers. As Learned Hand formulated the guiding principle of American law:

> It is not enough that he [the seller] does not forego *a normally lawful activity*, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, . . . have a stake in its outcome. 109 F.2d at 581 (emphasis added).

The key language is here "normally lawful activity." The routine supply of lawful services does not constitute joining an existing conspiracy. Many notorious criminals have had personal drivers. Even Hitler's driver was not prosecuted. *See* Erich Kempka, Ich habe Hitler verbrannt (1950), Albert Zoller, Hitler privat. Erlebnisbericht seiner Geheimsekretarin (1949). Bin Laden's personal driver could not more be guilty of an offense against the law of war than was Hitler's driver.

The *Falcone* principle is unquestionably good law. It was applied recently in *United States v. Blakenship*, 970 F.2d 283, in which Judge Easterbrook, writing for the Seventh Circuit, reversed the conviction of a defendant Lawrence who leased a trailer to a drug ring with full knowledge that the lessee intended to manufacture methamphetamine in the trailer. As Judge Easterbrook wrote, "Lawrence knew what Zahm [representing the drug ring] wanted to do in the trailer, but there is a gulf between knowledge and conspiracy." The Court stressed that the "war on drugs" provides no excuse for interpreting and applying the law loosely in order to sweep up as many knowing background players as possible. He criticized the trial judge for mentioning the "war on drugs" as though the broader "war" were relevant to the guilt or innocence of a specific defendant. This admonition is worth repeating with regarding to the DOD's efforts to persuade the courts with a grim recitation in the indictment of nefarious murders and terrorist acts committed by al Qaeda. An appeal to the "war on terror" is hardly a substitute for a sound legal argument.

So far as there are arguments on the other side, they are rooted in this Court's decision in *Direct Sales v United States*, 319 U.S. 703 (1943). The Court unanimously affirmed the conviction of a seller of morphine to a ring of illegal users. The factors that distinguished the case from *Falcone* were two (1) the seller "stimulated" the sales to buyer and therefore had an economic "stake in the venture" and (2) the item being sold was tightly regulated because it was dangerous in itself. The Court drew an analogy between the sale of morphine and the sale of machine guns. *Id.* at 710. Hamdan did not supply a service dangerous in itself. The language of the opinion in *Direct Sales* is instructive: "All articles of commerce may be put to illegal ends. But all do not have inherently the same susceptibility to harmful and illegal use." *Id.*

Of course, the services of a driver may be put to an "illegal end." But the services of a secretary to the Nazi Party, a driver to Al Capone, or a cook for Usama bin Laden are not like the sale of machine guns. In the language of *Falcone*, they are services that are "normally lawful" even though the recipient of the service may be engaged in nefarious and evil activities.

There is a difference between a one-shot driver who waits in the car while his accomplice commits a bank robbery and a driver who drives a thousand missions. If Hamdan drove only once a day for Usama bin Laden, he drove at least 1500 separate trips. Perhaps in some of them, as the indictment alleges, the leaders of al Qaeda transported weapons in the trunk of the car. But this only substantiates the comment of this Court in *Direct Sales*: "All articles [and services] of commerce may be put to illegal ends." Not every service provider automatically becomes a conspirator if he works for those involved in criminal activity. Hamdan's activities as a driver simply do not suffice to make him a conspirator in the events of September 11, 2001. The facts as alleged do not constitute a crime within the jurisdiction of a military tribunal under the law of war.

CONCLUSION

In the last century we have witnessed many efforts of prosecutors to inflate the doctrine of conspiracy beyond the limits that our traditional principles of criminal accountability. The impulse is often a desire to ascribe collective guilt to a whole group and thereby to hold associated individuals guilty by association. Judges have always had the good sense to defeat these prosecutorial aspirations by containing the doctrine of conspiracy within its traditional limits. This is the message of the Nuremberg trials, confirmed by the trials of war criminals in the Far East Tribunal, IMTFE. In both cases the judges restricted the charge of conspiracy to the redundant task of describing the collective actions of preparing, planning, initiating, and waging aggressive war.

In the 1950s the focus of the country shifted from the Nazi to the Communist threat and again prosecutors sought to rely on mere membership in a group to expand the sprawling and undefined limits of conspiracy prosecutions. Once more judges curtailed the expansive ambitions of "guilt by association" and insisted on proving the active contribution of every member of the alleged Communist conspiracy. In *Scales v. United States*, 367 U.S. 203 (1961) the Court interpreted the Smith Act to require "not only knowing membership [in the Party], but active and purposive membership, purposive that is as to the organization's criminal ends."

Now we are faced with the terrorist conspiracy of our time, not Fascist, not Communist, but a new and diffuse organization that has established a sporadic and unpredictable front across the Western world, the Middle East, and the entire Islamic world. The President has elected to describe this struggle as a war and to invoke the principles of the laws of war in response. While this may be the President's prerogative, he cannot change the laws of war by fiat.

The laws of war simply do not include for the crime of conspiratorial agreement. Nor do they permit the expansion of liability to include sub-conspiratorial forms of identifying

with or "joining" criminal organizations. This is the outcome in Nuremberg, the teachings of all international agreements since 1948, and most importantly, the message conveyed by this Court in *Milligan, Quirin, Yamashita,* and *Sosa*. Unless this court devises new grounds to break with international law and with its own tradition, it should conclude that conspiracy is not part of the law of war. In the alternative, it should at least restrict the jurisdiction of military commissions to the crime of conspiracy as it has been understood in federal law. Once it affirms its own precedents, the Court will have little choice but to hold that a military commission has no jurisdiction over a suspect who is charged with nothing but "joining an enterprise of persons who shared a common criminal purpose"

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Respectfully submitted,

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